

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION
NETWORK (WEAN),

Petitioner,

v.

ISLAND COUNTY,

Respondent.

Case No. 14-2-0009

**ORDER FINDING COMPLIANCE AND
CONTINUING NON-COMPLIANCE**

SYNOPSIS

The Petitioner initially challenged numerous provisions of Island County's Ordinance C-75-14, an update of its comprehensive plan and development regulations for fish and wildlife habitat conservation areas (FWHCAs). In the June 24, 2015, Final Decision and Order (FDO), the Board concluded the County failed to include Best Available Science (BAS) in designating and protecting the functions and values of critical area ecosystems, including the habitat of certain flora. The ordinance failed to protect specific types of FWHCAs: a Natural Area Preserve, as well as Westside Prairies, Oak Woodlands, and Herbaceous Balds. In addition, the Board concluded regulations regarding application of the term "reasonable use," and the removal of beaver and beaver dams failed to protect critical areas and include BAS. Finally, the County failed to establish clear standards for the exercise of administrative discretion in extending critical area exemptions to certain agricultural practices.

On compliance, the County adopted Ordinances C-44-16 and C-71-16, the first addressed the reasonable use definition, beaver management, and agricultural activities while the second addressed the remaining issues. The Board finds the County has achieved compliance on all but one of the issues and remands the matter as set forth in this order.

Following Island County's submittal of a compliance report,¹ the Board held a compliance hearing on August 25, 2016, in Coupeville, Washington. Board members Nina Carter, Raymond Paoella, and William Roehl took part in the hearing, with Mr. Roehl presiding. Island County (the "County") was represented by Susan E. Drummond and Adam R. Long. Petitioner Whidbey Environmental Action Network (WEAN) appeared through Steve Erickson, a member of WEAN.

At the beginning of the August 25 hearing, the Presiding Officer addressed numerous motions filed by the parties. Rulings on those motions are set forth in the Transcript of Proceedings.² Following that, WEAN asked the Board to allow supplementation of the record with proposed Exhibit 231, The IUCN Red List of Threatened Species. Although this proposed exhibit was clearly referenced in Exhibit 39 and could have been attached to either party's brief as an exhibit, the Board will allow it as a supplement to the record. However, it was added as Exhibit 232 since Exhibit 231, a photograph of Smith Prairie, was previously allowed by way of supplementation.

WEAN also objected to Ms. Drummond being allowed to represent the County. The Board notes she recently filed a notice of appearance on behalf of the County.³ Beyond that, the Board has no jurisdiction to rule on the question of who might be authorized to appear on the County's behalf.

I. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.⁴ After that period has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.⁵ For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance

¹ Island County's Compliance Report, filed July 11, 2016.

² Transcript of Proceedings, p. 6, line 15 through p. 11, line 22.

³ Filed August 22, 2016.

⁴ RCW 36.70A.300(3)(b).

⁵ RCW 36.70A.330(1) and (2).

1 finding, the presumption of validity applies and the burden is on the challenger to establish
2 that the new adoption is clearly erroneous in view of the entire record before the Board and
3 in light of the goals and requirements of the GMA.⁶

4 In order to find the County's action clearly erroneous, the Board must be "left with the
5 firm and definite conviction that a mistake has been made."⁷

6 Within the framework of state goals and requirements, the Board must grant
7 deference to local governments in how they plan for growth:
8

9 In recognition of the broad range of discretion that may be exercised by
10 counties and cities in how they plan for growth, consistent with the
11 requirements and goals of this chapter, the legislature intends for the
12 boards to grant deference to the counties and cities in how they plan for
13 growth, consistent with the requirements and goals of this chapter. Local
14 comprehensive plans and development regulations require counties and
15 cities to balance priorities and options for action in full consideration of
16 local circumstances. The legislature finds that while this chapter requires
17 local planning to take place within a framework of state goals and
18 requirements, the ultimate burden and responsibility for planning,
19 harmonizing the planning goals of this chapter, and implementing a
20 county's or city's future rests with that community. RCW 36.70A.3201 (in
21 part).

22 In sum, during compliance proceedings the burden remains on WEAN to overcome
23 the presumption of validity and demonstrate that the action taken by the County is clearly
24 erroneous in light of the goals and requirements of chapter 36.70A RCW, the Growth
25 Management Act.⁸ Where not clearly erroneous and thus within the framework of state
26 goals and requirements⁹, Island County's planning choices must be granted deference.

27 ⁶ RCW 36.70A.320(1), (2), and (3).

28 ⁷ *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d. 646 (1993).

29 ⁸ RCW 36.70A.320(2).

30 ⁹ It is appropriate to disabuse the County of the opinion that the Minimum Guidelines of chapter 365-190 WAC
31 cannot serve as the basis for a GMA violation finding as it argued in its Compliance Report. The Board stated
32 in a *Weyerhaeuser v. Thurston County* Compliance Order (No. 10-2-0020c):

However, based on the foregoing analysis, the Board concludes, in light of the *Manke* and *Lewis County* decisions, that RCW 36.70A.170(2) and RCW 36.70A.050 must be read to require jurisdictions to follow the Minimum Guidelines' MRL requirements.

Jurisdictions have the flexibility to assign varying weight to the factors related to long term commercial significance included in RCW 36.70A.030 and the applicable Guidelines. Jurisdictions also have the discretion to depart from other portions of the Guidelines which are merely suggestions, provided the

II. FISH & WILDLIFE HABITAT CONSERVATION AREAS

The GMA includes fish and wildlife habitat conservation areas (FWHCAs) as one type of “critical area.”¹⁰ The GMA requires cities and counties to protect the functions and values of critical area ecosystems, and the adopted ecosystem protections shall include BAS.¹¹ FWHCAs serve a critical role in sustaining needed habitats and species for the “functional integrity of the ecosystem.”¹² Development regulations must preserve the existing functions and values of critical areas and may not allow a net loss of the functions and values of the ecosystem that includes the impacted or lost critical areas.¹³

III. DISCUSSION AND ANALYSIS

The County addressed compliance with the adoption of two separate ordinances. Ordinance C-44-16 was adopted to remedy areas “amenable to simple resolution”.¹⁴ WEAN agreed at the compliance hearing that the County had achieved compliance on the violations addressed in that ordinance: definitions of “reasonable use”, an exemption for beaver dam removal, and an exemption regarding resumption of agricultural activities.¹⁵

Ordinance C-44-16:

The County’s prior code included two separate definitions of “reasonable use”. In the FDO, the Board found the controlling definition would allow “grandfathered non-conforming uses” which no longer comply with more recently enacted and, presumably, more protective land use laws, [to] be considered a ‘reasonable use’ when determining whether a proposed use met the reasonable use criteria.” That led to the Board’s conclusion that the code failed

departure provides comparable benefit. That freedom, however, does not extend to deviating from those portions of the Minimum Guidelines which are requirements.

See also *Friends of Pierce County v. Pierce County*, Case No. 12-3-0002c, FDO at 31.

¹⁰ RCW 36.70A.030(5).

¹¹ RCW 36.70A.170, RCW 36.70A.172.

¹² WAC 365-190-030(6)(a) [WAC Chapter 365-190 contains the “minimum guidelines that apply to all jurisdictions,” promulgated pursuant to RCW 36.70A.050].

¹³ RCW 36.70A.030(5), WAC 365-196-830(4). *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415 (2007) at 430.

¹⁴ Island County’s Compliance Report at 8.

¹⁵ Transcript of Proceedings at 16.

1 to protect FWHCAs in violation of RCW 36.70A.060 and RCW 36.70A.172.¹⁶ Ordinance C-
2 44-16 repealed the problem definition, thus achieving compliance.¹⁷

3 Violations of RCW 36.70A.060 and RCW 36.70A.172 also resulted from the County's
4 allowance of a FWHCA exemption for beaver dam removal based solely on the issuance of
5 a Hydraulic Project Approval from the Washington Department of Fish and Wildlife. WDFW
6 only considers fish life protection in granting HPAs; there is no consideration of other
7 functions and values of critical areas. To rectify the violation, the County deleted the
8 exemption, thus achieving compliance.¹⁸

9
10 Another FWHCA exemption found to be non-compliant was applicable to the
11 resumption of agricultural activities following an idle period. Two code sections authorized
12 the County to exempt the agricultural use from critical area regulations if it had lain idle for
13 five years or less but allowed additional time extensions for "appropriately limited and
14 reasonable amount[s] of time in order to account for unavoidable and unintentional events
15 which make active agricultural use impossible".¹⁹ The Board concluded this resulted in
16 violations of RCW 36.70A.060 due to the lack of clear standards for the exercise of
17 administrative discretion. The County amended the exemption to limit it to a total of three
18 years, thus achieving compliance.²⁰

19
20 **Ordinance C-71-16:**

21 **NAP Buffers**

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23 There is a single Natural Area Preserve in Island County (the Admiralty Inlet NAP;
24 also referred to as the Naas NAP) and the County previously designated it as a FWHCA.
25 NAPs are defined by RCW 79.70.020 (2):

26
27 "Natural areas" and "natural area preserves" include such public or
28 private areas of land or water which have retained their natural
29 character, although not necessarily completely natural and undisturbed,
30 or which are important in preserving rare or vanishing flora, fauna,

31 ¹⁶ FDO June 24, 2015, at 8.

32 ¹⁷ Ex. 48, at 5.

¹⁸ Ex. 48, at 12.

¹⁹ ICC 17.02B.060B and ICC 17.02B.300.

²⁰ Ex. 48, at 8.

1 geological, natural historical or similar features of scientific or educational
2 value and which are acquired or voluntarily registered or dedicated by
3 the owner under this chapter.

4 WEAN argues the County has failed to achieve compliance as its action focuses only
5 on "species preservation," observing the NAP includes a "rare forest community" in addition
6 to rare plant species.²¹ It suggests BAS dictates minimum buffers of 100 feet at the NAP's
7 southerly boundary to protect the NAP's forest community, contends the County's failure to
8 impose a minimum buffer width is a departure from BAS, and takes issue with the County's
9 case-by-case buffer requirement.²² WEAN also opines that future pressures will lead to
10 removal of hazard trees within the NAP.
11

12 WEAN's expressed concern regarding buffers for the forest community at the NAP
13 boundary was not raised during the initial phase of this matter. At that time, WEAN
14 challenged the County's decision to not require buffers to protect adjacent properties from
15 controlled burning, a prairie management tool, and resulting smoke. The Board agreed with
16 WEAN and found non-compliance in regards to NAP buffers as the County's decision was
17 based on assumptions not supported by the record.²³ While the Board questions WEAN's
18 raising of a new argument on compliance, it elects to address this second buffer related
19 challenge.²⁴
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23 _____
24 ²¹ WEAN's Objections to Finding Compliance at 5.

25 ²² *Id.*, at 7.

26 ²³ "By failing to establish buffers for the NAP based on an assumption that it encompasses 'the land required
27 for species preservation', the County has failed to protect the NAP's habitat or the functional integrity of its
28 ecosystem. Not only has the County focused solely on species protection but it has done so while making an
29 assumption that is nowhere supported by the record. By failing to establish buffers for the NAP based on an
30 assumption that it encompasses 'the land required for species preservation', the County has failed to protect
31 the NAP's habitat or the functional integrity of its ecosystem. Not only has the County focused solely on
32 species protection but it has done so while making an assumption that is nowhere supported by the record."
FDO at 23, 24.

²⁴ WEAN's issue regarding the NAP buffers was framed as follows: Issue 6. Do the buffer requirements
for Natural Area Preserves (17.02B.430E) fail to protect critical areas as required by RCW 36.70A.060
and WAC 365-190-080(1), 365-196-830(1)(3)(4)(6) or to include the Best Available Science as required
by RCW 36.70A.172 and WAC 365-190-080(2), §130(3), 365-196-830(5)(6) because they fail to protect
all critical area functions, fail to protect this critical area from adjacent development, or fail to provide any
buffers or setbacks from adjacent development? (WEAN's Issue 3.2.1).

1 First of all, the County examined its previous assumptions. NAPs are selected,
2 acquired, managed and protected by the Washington State Department of Natural
3 Resources. On compliance, the County obtained input from the DNR regarding whether the
4 NAP warranted the establishment of buffers and received the following observation:
5

6 [T]he primary conservation feature is a rare plant, golden paintbrush
7 (*Castilleja levisecta*). Additionally, the preserve, which is also known
8 locally as the Naas Preserve, features one of only seven known
9 Washington occurrences of a specific Douglas-fir/western hemlock
10 forested plant community. The site was designed to include the remaining
11 prairie soils at this location, which is the habitat for golden paintbrush, and
12 the entire forest community occurrence, which secondarily serves as a
13 buffer from edge effects for the two golden paintbrush populations on the
14 preserve.

15 The immediate adjacency of roads, development and cultivated fields
16 made decision-making regarding the placement of a boundary for this site
17 fairly straight forward. That is, we have captured within our boundary all of
18 the remaining natural habitat within the immediate vicinity.²⁵

19 The County also consulted the individuals who had prepared the County's 2014 BAS Report
20 which further confirmed that roads, development and agricultural uses truncate buffer
21 functions on all but the southern boundary of the NAP.²⁶ The May 5, 2016 BAS Report
22 included the following:

23 Based upon a review of the NAP property and its environs, the existing
24 Island County NAP does not require additional buffering to the north or
25 east, where existing development, ongoing agricultural uses, and roads
26 truncate buffer functions. Where the rare forest community extends south
27 beyond the boundaries of the NAP on to the Camp Casey property, buffer
28 management provisions are warranted ...
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²⁵ Ex. 40 (DNR Comment).

²⁶ Ex. 37, at 4.

1 Consequently, the County amended ICC 17.02B.430 to read as follows

2 Buffers shall not be required adjacent to these areas. ~~These areas are~~
3 ~~assumed to~~ as long as these areas encompass the land required for
4 species preservation. ~~The director may impose a new buffer or increase~~
5 ~~the applicable buffer if it is determined that a proposed development would~~
6 ~~infringe on or inhibit use of the entire property for species preservation.~~
7 The Planning Department shall confirm the public agency establishing and
8 managing the area has included sufficient land within these areas to
9 ensure no net loss of habitat functions and values. If buffers are required,
10 they shall reflect the habitat sensitivity and the type and intensity of activity
11 proposed to be conducted nearby.²⁷

12 WEAN's current argument that the County's compliance action narrowly focuses on
13 "species preservation" to the detriment of the forest community is not well taken. WEAN
14 quotes only the first sentence of ICC 17.02B.430.²⁸ The language of that section (set forth
15 above) also requires the County to ensure "no net loss of habitat functions and values" and,
16 if not, a development proposal is required to include buffers reflecting the sensitivity of the
17 habitat to the proposed development. That requirement is buttressed by ICC 17.02B.410,
18 which requires a "qualified professional" to prepare a Biological Site Assessment (BSA) for
19 all development proposals within 1000 feet of the NAP, excepting only those proposals
20 determined to result in "minor impacts".²⁹

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22 ²⁷ Ex. 1, Ex. A, at 3.

23 ²⁸ WEAN's Objections to Finding Compliance at 5. WEAN selectively quotes the County's amended ICC
24 17.02B.430.

25 ²⁹ ICC 17.02B.410(B) sets forth the requirements of a BSA:

26 Biological site assessment contents. A BSA shall be prepared by a qualified professional at the expense of
27 the applicant. The level of detail in a BSA should be proportionate to the location, size and impacts of the
28 project proposal. Unless modified by the director, a BSA shall include:

- 29 1. A site plan showing all critical areas and associated critical area buffers falling on or within 1,000
30 feet of the portion of the subject property proposed for development. The site plan shall also clearly
31 show the location and extent of all proposed clearing, earthwork, grading, excavation, filling,
32 structures, utilities, septic system components, wells, roads, parking areas, driveways and other
development; and
2. Descriptions of all critical areas shown on the site plan, including areas which may act as wildlife
corridors, ravines or steep slopes, etc.; and
3. Description of the proposed development, including, but not limited to, quantity and spatial extent
(area) of any proposed development, clearing, earthwork, grading, excavation, and filling, the
location and dimensions of all proposed structures, utilities, septic system components, and wells;
and

1 The forest community at issue straddles the southern end of the NAP. It totals
2 approximately 45 acres³⁰, nine of which are outside the NAP's boundary and owned by
3 Seattle Pacific University.³¹ WEAN's buffer argument relates to protection of the old-growth
4 forest community from wind throw within the NAP.³² WEAN argues the BAS recommends a
5 minimum buffer of 100 feet.³³ The County did not establish a firm buffer width. Rather, it
6 acknowledges the same BAS WEAN cites but observes 100 feet was the recommended
7 minimum of a 100-600 foot range.³⁴ The County's compliance language seeks to tailor the
8 required buffer width to the nature and location of any proposed development: The ". . .
9 buffer width shall reflect the habitat sensitivity and the type and intensity of activity proposed
10 . . .".³⁵ While WEAN might prefer a specific standard for protecting the NAP's southern
11 boundary, it is unable to meet its burden to establish that the County's action is clearly
12 erroneous in view of the entire record before the Board and in light of the goals and
13 requirements of the GMA.
14

15 **Designation/Protection of Specific Habitat Types**

16 WEAN's Issues 7, 8, and 9 all focused on alleged failures to designate and protect
17 habitat:
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23 4. Analysis of impacts to the protected species or habitats. A discussion of impacts to all critical
24 areas and critical area buffers must be included; and

25 5. The spatial extent of impact to critical areas and their buffers shall be quantified; and

26 6. Regulatory summary, identifying other agencies with jurisdiction; and

27 7. Best management practices, including a discussion of on-going maintenance practices that will
28 assure protection of all critical areas on-site after the project has been completed. If monitoring is
29 required, this section shall include a description of proposed monitoring criteria, methods, and
30 schedule.

31 8. The recommendations of the BSA, once approved, shall be included as conditions of approval of
32 the underlying permit.

30 Ex. 70, Best Available Science and Existing Conditions Report for Island County's Fish and Wildlife Habitat
Conservation Areas at 41.

31 ³¹ IR 37, at 3.

32 ³² IR 37.

³³ WEAN's Objections to Finding Compliance at 6.

³⁴ Island County's Compliance Reply at 16; IR 37 at 4.

³⁵ ICC 17.02B.430

- 1 1.) Not designating and protecting the habitat of flora where ETS species have a
2 primary association (Issue 7³⁶);
3 2.) Not designating and protecting Westside Prairie, Oak Woodland, and
4 Herbaceous Bald habitats (Issue 8³⁷);
5 3.) Not designating and protecting the habitat of the Western toad (Issue 9³⁸).
6

7 **Designation/Protection of Habitat of Flora³⁹ and Designation/Protection of Westside**
8 **Prairies, Oak Woodlands, and Herbaceous Balds**
9

10 The Board upheld WEAN's Issue 7 challenge due to the County's failure to designate
11 and protect the habitat of certain flora. On compliance, the County did not specifically
12 designate any additional plant species as requested by WEAN; that request quite possibly
13 resulting from the Board's unnecessary and inexact choice of words in its FDO.⁴⁰ WEAN's
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15
16 ³⁶ Issue 7. In not designating and protecting the habitat of flora listed by the federal or state government
17 as areas where endangered, threatened, or sensitive species have a primary association has Island
18 County, in reviewing and updating its critical area policies and regulations failed to comply with GMA's
19 requirements for designation and protection of critical areas and inclusion of the Best Available Science,
as required by RCW 36.70A.060, §172 and WAC 365-190-§030(6), §080(1)(2), §130(1)(2)(3)(4), 365-
196-830(1)(2)(3)(4)(5)(6)(8)(9)? (WEAN's Issue 3.3.1) Emphasis added

20 ³⁷ Issue 8. In not designating and protecting the rare, threatened, and biodiverse habitats of Westside
21 Prairie, Oak Woodland, and Herbaceous Balds, has Island County, in reviewing and updating its critical
22 area policies and regulations failed to comply with GMA's requirements for designation and protection of
23 critical areas and inclusion of the Best Available Science, as required by RCW 36.70A.060, §172 and
WAC 365-190-§030(6), §080(1)(2), §130(1)(2)(3)(4), 365-196-830(1)(2)(3)(4)(5)(6)(7)(8)(9)? (WEAN's
Issue 3.3.2) Emphasis added

24 ³⁸ Issue 9. In not designating and protecting the habitat of species listed by the Washington Department
25 of Fish and Wildlife as candidates for listing as endangered or threatened or by the U.S. Fish and
26 Wildlife Service as species of concern, particularly Western Toad, has Island County failed to comply
27 with GMA's requirements for designation and protection of critical areas and inclusion of the Best
Available Science, as required by RCW 36.70A.060, §172 and WAC 365-190-§030(6)(19), §080(1)(2),
§130(1)(2)(3)(4), 365-196-830(1)(2)(3)(4)(5)(6)(8)(9)? (WEAN's Issue 3.3.3) Emphasis added

28 ³⁹ An issue raised by WEAN in Case Number 98-2-0023c addressed an alleged County failure to designate
29 four plant species as species of local importance. An argument may remain as to whether that claim has been
resolved.

30 ⁴⁰ "Here the County listings omit three ETS flora species the presence of which in the County has been
31 documented in the scientific record." FDO at 35. That sentence should have stated: "Here the County listings
32 omit **the habitats** of three ETS flora species the presence of which in the County has been documented in the
scientific record." The Board's following sentence clarified that misstatement: "As to Issue 7, WEAN has met
its burden of proof to establish violations of RCW 36.70A.060 and RCW 36.70A.172 due to the County's failure
to designate and protect habitat of flora listed by the federal or state government as areas where
endangered, threatened, or sensitive species have a primary association."

1 Issues 7, 8, and 9, and the Board's decision, focused on habitat as opposed to specific
2 species and the Board's ruling addressed that focus: whether or not the County had
3 appropriately designated the habitat of federal or state listed flora with which those species
4 had a primary association.⁴¹ The BAS in the record establishes that three listed species
5 (previously designated by the County as species of local importance⁴²) have a primary
6 association with prairies located on Whidbey Island: the Golden paintbrush, White-topped
7 aster, and White meconella.⁴³

9 On compliance, the County designated twelve additional plant habitat areas as
10 FWHCAs of local importance, consisting of prairies, oak woodlands, and herbaceous
11 balds.⁴⁴ These areas are identified as general locations on Ordinance C-71-16's Exhibit C
12 map and specifically listed in the Ordinance at ICC 17.02B.510(C). Any proposed
13 development within 1000 feet of these areas necessitates the preparation of a biological site
14 assessment (BSA) specifically locating the critical area and possible impacts.⁴⁵
15 Recommendations included in the BSA then become "conditions of approval" for any
16 development permit.⁴⁶ If impacts are anticipated, the County can also require the
17 preparation of a habitat management plan.⁴⁷

19 The County's designation of the twelve additional prairies, oak woodlands, and
20 herbaceous balds also served to address the Board's finding of non-compliance regarding
21 Issue 8. In the FDO, the Board found and concluded the County had failed to include BAS
22 through its decision to not designate and protect Westside Prairies, Oak Woodlands, and
23

25 ⁴¹ Island County's failure to designate and protect habitat of flora listed by the federal or state governments as
26 areas where endangered, threatened, or sensitive species have a primary association fails to protect critical
27 areas in violation of RCW 36.70A.060 and fails to include the Best Available Science in protecting critical area
ecosystems in violation of RCW 36.70A.172. FDO at 47.

28 ⁴² ICC 17.02B.510.

29 ⁴³ Exs. 38 at 4-5, 37 at 4. See also FDO at 35: According to the BAS Report, the Golden Paintbrush, White
30 Meconella, and White-top Aster ". . . occur in prairie habitats, [and] where the term prairie in this document is
31 used as a general descriptor for wet and dry prairies, herbaceous balds, and herbaceous communities atop
coastal bluffs." The record thus establishes these three ETS species have a primary association with the
County's prairies and herbaceous balds.

32 ⁴⁴ Ex. 1, Ex. A, at 5.

⁴⁵ ICC 17.02B.410(B)(1-7).

⁴⁶ ICC 17.02B.410(B)(8).

⁴⁷ ICC 17.02B.430(F) and (G).

1 Herbaceous Balds, resulting in violations of RCW 36.70A.060 and RCW 36.70A.172.⁴⁸
2 While the County observed that most of those 12 areas were subject to varying levels of
3 protection through existing County critical area regulations as well as through state
4 management measures, it observed designation as FWHCAs would provide an additional
5 level of protection.⁴⁹

6 WEAN now objects to the County's decision to designate these areas as habitats of
7 local importance, contending such a designation fails to provide adequate protection.⁵⁰ It
8 argues that the GMA and BAS mandate a higher designation although it cites no statutory
9 provision or BAS from the record requiring that. The Board specifically found:

11 WAC 365-190-130(2)(b) *directs jurisdictions to consider habitats and*
12 *species of local importance for classification and designation.* Although the
13 record establishes these areas constitute *rare or vulnerable ecological*
14 *systems and habitat or habitat elements* (RCW 36.70A.030(6)(a)), the
15 County did not designate Westside prairies, Oak woodlands and
16 herbaceous balds as habitats of local importance.⁵¹ (emphasis included in
the original)

17
18 On compliance the County designated twelve areas as FWHCAs of local importance,
19 five more than the seven prairie or oak woodland sites earlier BAS information in the record
20 disclosed. Protection is provided as addressed above on page 8 and footnote 29.

21 WEAN has failed to meet its burden to establish that the County's action is clearly
22 erroneous in view of the entire record before the Board and in light of the goals and
23 requirements of the GMA. The County has achieved compliance on Issues 7 and 8.

24 **Designation/Protection of the Western Toad**

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26 The County failed to designate and protect the Western toad as a species of local
27 importance⁵² leading the Board to conclude in the FDO that WEAN had met its burden to

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30 ⁴⁸ FDO at 47: Island County's failure to designate and protect Westside Prairies, Oak Woodlands, and
31 Herbaceous Balds as habitats of local importance fails to protect critical areas in violation of RCW 36.70A.060
and fails to include the Best Available Science in protecting critical area ecosystems in violation of RCW
36.70A.172. (WEAN's Issue 8).

32 ⁴⁹ Ordinance C-71-16, Finding 5.7.

⁵⁰ WEAN's Objections To Finding Compliance at 25-28.

⁵¹ FDO at 37.

1 establish violations of RCW 36.70A.060 and RCW 36.70A.172.⁵³ While the County on
2 compliance elected not to designate the Western toad as a species of local importance, it
3 added ICC 17.02B.210 to its code, an addition which it states will further protect this
4 species:

5 Western Toad breeding sites, as documented by scientifically verifiable
6 data from WDFW, or a qualified professional, shall be protected through
7 the County's wetland and stream critical areas regulations, presently
8 codified in Title 17.

9
10 The County supports its decision by observing the Western toad was removed from
11 the federal list of species of concern subsequent to the Board's FDO, although it remains a
12 "state candidate [for listing] species". It further observes that the rationale for designating a
13 species is to identify areas which serve "a critical role in sustaining needed habitats and
14 species for the functional integrity of the ecosystem, and which, if altered, may reduce the
15 likelihood that the species will persist over the long-term". WAC 365-190-030(6)(a). The
16 County states BAS fails to disclose the health of the species in the County.⁵⁴ It
17 acknowledges the BAS establishes the Western toad has a "primary association" with
18 wetlands, which support breeding and tadpole development, a critical role in sustaining the
19 toad.⁵⁵ As a result of its review of BAS, the County adopted ICC 17.02B.210 which, when
20 combined with ICC 17.02B.410, requires the preparation of a Biological Site Assessment or
21 BSA whenever development is proposed within 1000 feet of a protected species, a critical
22 area, or its buffer. See footnote 29 above. Thus, the County asserts any critical area
23 wetlands known to serve as breeding/development habitat for the toad will require additional
24 protection.
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28 ⁵² WAC 365-190-030(19) "Species of local importance" are those species that are of local concern due to their
29 population status or their sensitivity to habitat alteration or that are game species.

30 ⁵³ FDO at 40; FDO at 48: Island County's failure to designate and protect the Western Toad as a species of
31 local importance fails to protect critical areas in violation of RCW 36.70A.060 and fails to include the Best
32 Available Science in protecting critical area ecosystems in violation of RCW 36.70A.172. (WEAN's Issue 9).

⁵⁴ BAS lacks documentation of population or population trends for the toad in Island County. Furthermore,
upland habitat is not known to be limiting the toad in the County. Ex. 39.

⁵⁵ Ex. 39, Western Toad Best Available Science Review, Technical Memorandum by The Watershed
Company (May 5, 2016) at 4.

1 Although this toad uses open water for breeding and egg development, it is also
2 known to disperse into upland terrestrial habitat following metamorphosis.⁵⁶ However, that
3 dispersal and the type of habitat used is not well understood. Analysis indicated upland
4 habitat in the County was not known to be a limiting factor given the broad range of habitat
5 used by the toad and the predominantly rural, undeveloped nature of the County.⁵⁷
6 Consequently, the County concluded it lacked any scientific basis for adopting additional
7 protective regulations:
8

9 BAS does not support regulating a species when the science shows that it
10 is unknown whether the species is in decline and if it is, what is causing
11 that decline.⁵⁸

12 That conclusion relied upon the following BAS observation:

13 The County has proposed to protect known breeding habitat wetlands,
14 which are areas with which the species is known to have a primary
15 association. The County is not proposing to protect upland habitats
16 extending beyond the buffer of documented breeding-site wetlands
17 because of the uncertainty in Western toad population trends, upland
18 habitat use, and stressors in Island County. Without additional information
19 related to these population trends, upland habitat use, and stressors, it is
20 not possible to determine what additional regulatory management
21 measures would effectively conserve the Western toad.⁵⁹

22 Although the County did not designate the Western toad as a species of local
23 importance, it contends it has designated its breeding sites as fish and wildlife habitat
24 conservation areas, thus protecting that portion of the toad's habitat with which it is known to
25 have a primary association.⁶⁰ At the Compliance Hearing the County continued to insist it
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28 ⁵⁶ Ex. 39 at 2.

29 ⁵⁷ Ex. 39 at 1-6.

30 ⁵⁸ Ex. 1, (Ordinance C-71-16) Finding 4.2.4.

31 ⁵⁹ Ex. 11 (Supplemental BAS Report), p. 1.

32 ⁶⁰ As previously stated, WEAN's Issue 9 focused on habitat: Issue 9. In not designating and protecting the
habitat of species listed by the Washington Department of Fish and Wildlife as candidates for listing as
endangered or threatened or by the U.S. Fish and Wildlife Service as species of concern, particularly Western
Toad, has Island County failed to comply with GMA's requirements for designation and protection of critical
areas and inclusion of the Best Available Science, . . .

1 had designated the toad's breeding habitat as FWHCAS.⁶¹ However the Ordinance is less
2 than clear in that regard. The sole language regarding the toad added to the County's Code
3 was Section 17.02B.210, entitled Western Toad

4 Western Toad breeding sites, as documented by scientifically verifiable
5 data from WDFW, or a qualified professional, shall be protected through
6 the County's wetland and stream critical area regulations, presently
7 codified in Title 17.

8 That section follows ICC 17.02B.200 which is entitled "Fish and wildlife habitat conservation
9 areas" but 17.02B.210 is not a subsection of 17.02B.200. Rather it appears to be a stand-
10 alone code provision and does not specifically designate and protect the Western toad nor
11 its known breeding sites as a species/habitat of local importance. While counsel for the
12 County stressed that it was *the intent* to designate known Western toad breeding sites as
13 FWHCAs; that intent does not appear to have been realized.

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15 The Board acknowledges what appear to be decreasing concerns regarding the
16 toad.⁶² However, so long as the Western toad remains a state candidate species⁶³, it must
17 be considered for protection.⁶⁴ That protection could begin with designation of the Western
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21 ⁶¹ Transcript at 74, lines 12-13, 21-23: "Its breeding sites are what are protected, and those breeding sites are
22 fish and wildlife habitat conservation areas. ... so those breeding sites are absolutely protected. It is a
23 designated fish and wildlife habitat conservation area."

24 ⁶² Compare WDFW's Priority Habitat and Species (dated in 2008 and the Western toad section does not
25 appear to have been updated since then) with Exhibit 232, the International Union for Conservation of Nature
26 Red List of Threatened Species (2016): The latter lists the Western toad as of "Least Concern" in 2016. It
27 notes that it had it assessed as "Endangered" in 1996 and "Near Threatened" in 2004. Both WDFW's PHS and
28 the IUCN Red List are referenced in Exhibit 39.

29 ⁶³ According to BAS, the Western toad is both "vulnerable" and a "candidate for listing" in Washington State.
30 See Western Toad Best Available Science Review, Technical Memorandum by The Watershed Company
31 (May 5, 2016) at 2; Ex. 39.

32 ⁶⁴ 365-190-130(4) (b) Habitats and species areas of local importance. Counties and cities should identify,
classify and designate locally important habitats and species. Counties and cities should consult current
information on priority habitats and species identified by the Washington state department of fish and wildlife.
Priority habitat and species information includes endangered, threatened and sensitive species, but also
includes candidate species and other vulnerable and unique species and habitats.

WDFW's Priority Habitat and Species List references the NatureServ Species Report which in turn states
under Minimum Criteria for an Occurrence: Occurrences are based on evidence of historical presence, or
current and likely recurring presence, at a given location. Such evidence minimally includes collection or
reliable observation and documentation of one or more individuals (including larvae or eggs) in or near
appropriate habitat where the species is presumed to be established and breeding.

1 toad itself or, based on the BAS in the record, with designation of the toad's known habitat.⁶⁵
2 Under WAC 365-190-080(4), critical areas can be designated by maps or by performance
3 standards, although performance standards are preferred over maps. If the County's Code
4 were to be clarified, protection of the Western toad could then be addressed through
5 preparation of a Biological Site Assessment pursuant to ICC 17.02B.410.

6 WDFW's Priority Habitat and Species List (which constitutes BAS⁶⁶) states that any
7 "occurrence" of the toad is a "priority area". PHS in turn references the NatureServ Species
8 Report which then states under Minimum Criteria for an Occurrence: "Occurrences are
9 based on evidence of historical presence, or current and likely recurring presence, at a
10 given location."⁶⁷ The State Department of Fish & Wildlife (WDFW) has documented three
11 "occurrences" of the Western toad in Island County, "one of which is a breeding site."⁶⁸ The
12 other two WDFW-documented sites are terrestrial nonbreeding habitat.⁶⁹ The record before
13 the Board thus indicates there are possibly three locations evidencing current or likely
14 recurring presence. WDFW PHS information is considered to be Best Available Science.⁷⁰

15 Island County purported to protect the one WDFW-documented breeding site for the
16 Western toad in Ordinance C-71-16 by referencing previously adopted regulations for
17 wetland and stream critical areas regulations. But the County failed to designate the
18 Western toad known "occurrences" as FWHCAs.
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27 ⁶⁵ Exhibit 39 at 4: "Habitats with which Western toads have a known primary association are wetlands, which
28 support breeding and tadpole development." Exhibit 39 (May, 2016) refers to one breeding site while Exhibit
29 11 (June, 2016) refers to three. The difference may relate to whether or not the sites are within shoreline
management act jurisdiction.

30 ⁶⁶ WAC 365-190-130(4)(b).

31 ⁶⁷ <http://explorer.natureserve.org/servlet/NatureServe?searchName=Bufo+boreas>. See Population/Occurrence
Delineation.

32 ⁶⁸ Finding 4.2.3 of Island County Ordinance C-71-16, p.7 (June 23, 2016). Also Ex. 39.

⁶⁹ Ex. 39 at 2; that exhibit indicates one or more of those sites may fall within the jurisdictional purview of the
Shorelines Management Act.

⁷⁰ WAC 365-190-130(4)(b).

Thus, the Board finds and concludes:

- Island County Ordinance C-71-16 fails to protect the functions and values of critical area ecosystems, contrary to BAS in the record.
- The Board has the firm and definite belief that a mistake has been made.
- WEAN has satisfied its burden of proof to establish that Ordinance C-71-16 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA as the County's compliance action failed to include Best Available Science in designating and protecting the Western toad and/or its habitat.

III. ORDER

Based on the foregoing, Island County is found to be in continuing non-compliance as addressed above and must take legislative action to achieve compliance, according to the following schedule:

Compliance Due	January 27, 2017
Compliance Report and Index to the Record Due (County to file and serve on all parties)	February 10, 2017
Any Objections to a Finding of Compliance Due	February 24, 2017
County's Response Due	March 6, 2017
Telephonic Compliance Hearing Call 1 (800) 407-9804 and use pin 7757643#	March 16, 2017 10:00 am

Dated this 29th day of September, 2016.

William Roehl, Board Member

Nina Carter, Board Member

Raymond Paolella, Board Member

1 **Note: This is a final decision and order of the Growth Management Hearings Board**
2 **issued pursuant to RCW 36.70A.300.⁷¹**
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30 ⁷¹ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all
31 parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.

32 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be
served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC
242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth
Management Hearings Board is not authorized to provide legal advice.